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# LEGAL POSITIVISM AND FEDERALISM: THE CERTIFICATION EXPERIENCE

*Paul A. LeBel\**

## INTRODUCTION

A certification process currently in place in more than half of the states<sup>1</sup> authorizes the highest state court<sup>2</sup> to answer questions of state law<sup>3</sup> that are certified to the state court by a federal court

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<sup>1</sup> Certification procedures have been authorized by the following state constitutional, statutory, or rule of court provisions: ALA. CONST. art. VI, § 6.02(b)(3), ALA. R. APP. P. 18; ARIZ. REV. STAT. ANN. §§ 12-1861 to -1867 (Supp. 1984); COLO. APP. R. 21.1; FLA. CONST. art. V, § 3(b)(6), FLA. STAT. ANN. § 25.031 (West 1974), FLA. APP. R. 9.150; O.C.G.A. § 15-2-9 (1985), GA. S. CT. R. 37; HAWAII REV. STAT. § 602-5(2) (Supp. 1984); IND. CODE ANN. § 33-2-4-1 (Burns 1985), IND. R. APP. P. 15(O); IOWA CODE ANN. §§ 684A.1-.11 (West Supp. 1985), IOWA R. APP. P. 451-461; KAN. STAT. ANN. §§ 60-3201 to -3212 (1983); KY. R. CIV. P. 76.37; LA. REV. STAT. ANN. § 13:72.1 (West 1983), LA. S. CT. R. XII; ME. REV. STAT. ANN. tit. 4, § 57 (Supp. 1984), ME. R. CIV. P. 76B; MD. CTS. & JUD. PROC. CODE ANN. §§ 12-601 to -609 (1984); MASS. S. JUD. CT. R. 1:03; MICH. CT. R. 7.305; MINN. STAT. ANN. § 480.061 (West Supp. 1985); MISS. S. CT. R. 46; MONT. S. CT. R. 1; N.H. S. CT. R. 34; N.M. STAT. ANN. § 34-2-8 (1981); N.D. R. APP. P. 47; OKLA. STAT. ANN. tit. 20, §§ 1601-1612 (West Supp. 1984); R.I. R. APP. P. 6; WASH. REV. CODE ANN. §§ 2.60.010-.900 (Supp. 1985), WASH. R. APP. P. 16.16; W. VA. CODE §§ 51-1A-1 to -12 (1981); WIS. STAT. ANN. §§ 821.01-.12 (West Supp. 1984); WYO. R. APP. P. 11; P.R. S. CT. R. 27. The National Conference of Commissioners on Uniform State Laws and the American Bar Association approved a Uniform Certification of Questions of Law Act in 1967. See UNIF. CERTIF. OF QUESTIONS OF LAW ACT, 12 U.L.A. 49 (1975).

<sup>2</sup> Oklahoma authorizes both its supreme court and its court of criminal appeals to answer questions of state law which have been certified to them. OKLA. STAT. ANN. tit. 20, § 1602 (West Supp. 1984).

<sup>3</sup> The certification statute or rule-of-court provision typically makes the certification procedure available when the state law question may be determinative of the action pending in the federal court. See, e.g., COLO. APP. R. 21.1; IOWA CODE ANN. § 684A.1 (West Supp. 1985). One variation is, on its face, more restrictive. It requires that the state law question be (rather than *may be*) determinative of the outcome of the case in order for the federal court to certify it. See, e.g., MISS. S. CT. R. 46 ("questions . . . of law of this state which *are determinative* . . . independently of any other questions involved"); N.M. STAT. ANN. § 34-2-8 (1981) ("questions involve propositions of New Mexico law which are determinative of the

that is required to use state law as the rule of decision.<sup>4</sup> Although many commentators have discussed the certification process,<sup>5</sup> the

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cause before the Federal court").

The certification statute or rule may limit the search for controlling precedent to the decisions of the highest court of the state, *see, e.g.*, FLA. APP. R. 9.150, or to the decisions of the appellate courts of the state, *see, e.g.*, GA. S. CT. R. 37; KAN. STAT. ANN. § 60-3201 (1983). A federal court making an *Erie* determination of state law is not limited to the decisions of the highest court of the state. *See* 1A Pt. 2 J. MOORE, W. TAGGART, A. VESTAL & J. WICKER, MOORE'S FEDERAL PRACTICE ¶ 0.307 (2d ed. 1985) [hereinafter cited as 1A MOORE'S].

<sup>4</sup> Seven of the states that have adopted certification procedures make certification available only to federal appellate courts. For the relevant statutes and rule-of-court provisions for Florida, Georgia, Hawaii, Indiana, Louisiana, Mississippi, and Wisconsin, *see supra* note 1. The remainder of the states that have adopted certification procedures permit their highest courts to answer questions certified by federal trial courts, as well as appellate courts. Eleven states—Iowa, Kansas, Kentucky, Maryland, Massachusetts, Michigan, Minnesota, North Dakota, Oklahoma, West Virginia, and Wisconsin—also permit their highest courts to answer questions that have been certified from the courts of other states. For the certification provisions of those states, *see supra* note 1.

<sup>5</sup> *See, e.g.*, C. SERON, CERTIFYING QUESTIONS OF STATE LAW: EXPERIENCE OF FEDERAL JUDGES (1983); Brown, *Certification—Federalism in Action*, 7 CUM. L. REV. 455 (1977) (discussing certification within the Fifth Circuit and advocating a more widespread use of it); Kaplan, *Certification of Questions from Federal Appellate Courts to the Florida Supreme Court and Its Impact on the Abstention Doctrine*, 16 U. MIAMI L. REV. 413 (1962) (discussing the shortcomings of abstention and how certification achieves the same goals while alleviating these problems); Lillich & Mundy, *Federal Court Certification of Doubtful State Law Questions*, 18 UCLA L. REV. 888 (1971) (evaluating various certification rules and statutes in terms of delay, abstractness, and effect of state court's answer); Mattis, *Certification of Questions of State Law: An Impractical Tool in the Hands of the Federal Courts*, 23 U. MIAMI L. REV. 717 (1969) (concluding that certification is too broad and restricts federal courts); McCree, *Foreward*, 23 WAYNE L. REV. 255 (1977) (presenting a brief outline of the advantages of certification and discussing the factors to be used in deciding whether to certify a question); McKusick, *Certification: A Procedure for Cooperation Between State and Federal Courts*, 16 ME. L. REV. 33 (1964) (discussing the advantages of certification and advocating adoption of the procedure by other states); Roth, *Certified Questions from the Federal Courts: Review and Re-proposal*, 34 U. MIAMI L. REV. 1 (1979) (suggesting the adoption of new rules and advocating the use of a system to detect sooner the presence of state questions). Note, *The Uniform Certification of Questions of Law Act*, 55 IOWA L. REV. 465 (1969) (discussing the advantages of certification and suggesting the adoption of the Uniform Certification of Questions of Law Act); Note, *Civil Procedure—Scope of Certification in Diversity Jurisdiction*, 29 RUTGERS L. REV. 1155 (1976) (discussing the process of certification and the proper scope of the procedure) [hereinafter cited as Note, *Civil Procedure*]; Note, *Abstention—Certified Questions—Justiciability—Federal Proceedings Postponed until State Court Determines Uncertain State Law*, 40 TEX. L. REV. 1041 (1962) (suggesting three questions, the answers to which determine the proper action of the state court after abstention has been applied); Note, *Florida's Interjurisdictional Certification: A Reexamination to Promote Expanded National Use*, 22 U. FLA. L. REV. 21 (1969) (discussing early uses of the certification process and suggesting a number of ways for Florida to tighten its certification procedure); Note, *Inter-Jurisdictional Certification: Beyond Abstention Toward Cooperative Judicial Federalism*, 111 U. PA. L. REV. 344 (1963) (prais-

topic has not received a thorough examination of the underlying theory. The following discussion of the jurisprudential underpinnings of certification should help sharpen the understanding of legislators and judges faced with certification issues.

Certification is a distinctive response to the "other-law" problem, which arises within a legal structure organized on federalism lines. In a variety of contexts, judicial decisions may depend not on what the decisionmaking court would do with the question before it, but rather on how some other institution would decide the question. The most ubiquitous of the other-law situations encountered by the federal judiciary is the *Erie*-based obligation to include state judicial decisions as a part of the relevant state law that is treated as the rule of decision,<sup>6</sup> but the *Erie* doctrine is not the sole source of the federal court's duty to decide a question as another court would decide it. Specific federal statutory provisions may explicitly<sup>7</sup> or implicitly<sup>8</sup> refer federal courts to state law for

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ing inter-jurisdictional certification and suggesting a broadening of its application); Note, *Inter-jurisdictional Certification and Full Faith and Credit in Federal Courts*, 45 WASH. L. REV. 167 (1970) (analyzing the certification process and suggesting solutions for the problems involved with the process); Note, *The Case for Certification*, 12 WM. & MARY L. REV. 627 (1971) (discussing the pros and cons of certification and praising its potential success for alleviating the burdens of delays); Note, *Abstention and Certification in Diversity Suits: "Perfection of Means and Confusion of Goals,"* 73 YALE L.J. 850 (1964) (criticizing the expansion of the abstention doctrine by courts and its effects upon diversity jurisdiction); Comment, *Federal Jurisdiction—Abstention—Inter-Sovereign Certification*, 48 IOWA L. REV. 185 (1962) (giving an overview of federal abstention in light of *Clay v. Sun Ins. Office*, 363 U.S. 207 (1960), and analyzing Florida's statutory approach to certification); Comment, *Inter-Sovereign Certification as an Answer to the Abstention Problem*, 21 LA. L. REV. 777 (1961) (discussing the problems raised in the type of abstention used in *Clay*); Comment, *Certification to State Courts: Progress in the Field of Federal Abstention*, 36 TULANE L. REV. 571 (1962) (discussing the Florida certification process); Case Note, *Federal Abstention—Due Process in Conflicts of Laws in the Application of the Lex Fori*, 10 AM. U. L. REV. 88 (1961) (summarizing the Supreme Court's treatment of abstention in *Clay*); Case Note, *Civil Procedure—Certified Question—Exercising the Power to Answer Federal Court Certification of State Law Questions*, 12 LAND & WATER L. REV. 337 (1977) (advocating liberal procedure of certification for Wyoming, to make it more useful).

<sup>6</sup> See *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938); *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496-97 (1941) (state choice-of-law rules are part of the state law to be employed by federal courts). See generally M. REDISH, *FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER* 169-203 (1980); C. WRIGHT, *THE LAW OF FEDERAL COURTS* 347-87 (4th ed. 1983).

<sup>7</sup> See, e.g., *Outer Continental Shelf Lands Act*, 43 U.S.C. § 1333(a)(2)(A) (1982) ("To the extent that they are applicable and not inconsistent with . . . Federal laws and regulations . . . , the civil and criminal laws of each adjacent State . . . are declared to be the law of the United States for that portion of the . . . outer Continental Shelf . . . which would be within

the answer to a question that arises in litigation under the statute. In these circumstances, the certification procedure enables a federal court to obtain a determination of the other-law issue from the court that has the authority to say what that other law is.<sup>9</sup>

Certification also displays the characteristics of an adjudicatory technique that can be called "decision-ducking." In its pure forms, decision-ducking involves a judicial refusal to hear a particular case. Forum non conveniens dismissal<sup>10</sup> and convenience transfer of venue<sup>11</sup> are examples of this "case avoidance" type of decision-ducking. Decision-ducking in a less extreme form may be limited to a particular issue that arises in a case. An example of this "issue avoidance" type of decision-ducking is *Pullman* abstention,<sup>12</sup> in which the federal court retains jurisdiction over a case pending before it, but issues a stay while the parties resort to a state court for resolution of a state law issue that might make unnecessary the decision of a federal constitutional issue.<sup>13</sup>

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the area of the State if its boundaries were extended seaward to the outer margin of the outer Continental Shelf"). In *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 481 (1981), the Court stated, "a personal injury action involving events occurring on the Shelf is governed by federal law, the content of which is borrowed from the law of the adjacent State".

<sup>9</sup> See, e.g., 26 U.S.C. § 6321 (1982) (creating federal tax lien "upon all property and rights to property, whether real or personal, belonging to" a person who is liable for any tax and "neglects or refuses to pay" after demand for payment). In *Aquilino v. United States*, 363 U.S. 509, 512-14 (1960), the Court noted that in deciding "whether and to what extent the taxpayer had property or rights to property to which the tax lien could attach," courts must look to state law, which is controlling in the determination of the nature of the taxpayer's legal interest in the property sought to be reached by the statute.

<sup>10</sup> For a discussion of the federal court certification of issues arising under the federal statutes cited *supra* notes 7-8, see *Olsen v. Shell Oil Co.*, 574 F.2d 194, 196 (5th Cir. 1978) (certifying to Louisiana Supreme Court question of state law arising in Outer Continental Shelf Lands Act Case); *United States v. United Banks*, 542 F.2d 819, 821 (10th Cir. 1976) (reversing trial court judgment on the basis of Colorado Supreme Court's answer to question of state law certified by federal appellate court).

<sup>11</sup> See generally J. FRIEDENTHAL, M. KANE & A. MILLER, *CIVIL PROCEDURE* 87-94 (1985) (explaining and evaluating forum non conveniens).

<sup>12</sup> See 28 U.S.C. § 1404(a) (1982), which provides: "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

<sup>13</sup> See *Railroad Comm'n v. Pullman*, 312 U.S. 496 (1941).

<sup>14</sup> See generally Field, *The Abstention Doctrine Today*, 125 U. PA. L. REV. 590 (1977); Field, *Abstention in Constitutional Cases: The Scope of the Pullman Abstention Doctrine*, 122 U. PA. L. REV. 1071 (1974). Certification of questions of state law is more properly viewed as a way to implement an abstention decision, see *infra* note 36, than as a form of abstention. So long as the Supreme Court's decision in *Meredith v. City of Winter Haven*, 320 U.S. 228 (1943), is read as precluding abstention for the sole purpose of avoiding the

One can thus describe certification as an issue-avoidance, decision-ducking technique used to deal with the other-law problem, which arises in federal courts that are required to apply state law to particular issues. Because certification involves a court in the federal judicial system posing a question to a court within a state judicial system, it is appropriate to refer to this kind of decision-ducking as "intersystemic."<sup>14</sup> While such a characterization may appear to be excessively—even oppressively—the product of an academic tendency to classify run amok, the exercise of placing certification within the broader categories of adjudicatory techniques with which it shares some key features sharpens the focus on the ways in which certification differs from closely analogous techniques such as *Pullman* abstention. Part I of this article will explore those differences, not from the perspective of the pros and cons of certification, but rather as the introduction to an exercise in applied jurisprudence.

Contemporary analytical jurisprudence has been criticized for its emphasis on the often trivial problems of verbal controversies,<sup>15</sup> and for the irrelevance of modern legal theory to all but a small class of insiders whose efforts are unwisely detached from the more significant issues of political theory.<sup>16</sup> An examination of the procedural device of intersystemic certification reveals the significance of the theoretical disputes in two of the major issues of contemporary jurisprudence, the nature of law and the nature of adjudica-

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decision of a difficult question of state law, see M. REDISH, *supra* note 6, at 258, federal courts certifying questions of state law need to find a label other than abstention for what they are doing. Identifying certification as one of a number of decision-ducking techniques that are routinely used by federal courts outside of the abstention setting may make it easier to reconcile this procedural device with the *Meredith* prohibition.

<sup>14</sup> This article focuses on the relationship between judicial decisionmaking and the boundaries of legal systems. The legal systems with which the article deals are the federal system and the fifty states. The article examines in some detail the significance of shifts in decisionmaking responsibility across system boundaries. An *intersystemic* move involves such a shift from a court located within one system to a court located in another, as from a federal court to a state court, or from a court of one state to a court of another state. Moves may be *intrasystemic* as well, such as the move from one federal district court to another. The intersystemic/intrasystemic distinction does not necessarily track an interstate/intrastate distinction. A move from a federal court sitting in a state to a state court of that state is intersystemic and intrastate. Intersystemic interstate moves are illustrated by a move from a federal court sitting in one state to a state court of a different state.

<sup>15</sup> See Williams, *The Controversy Concerning the Word "Law,"* in *Philosophy, Politics and Society*, 134-56 (P. Laslett ed. 1956).

<sup>16</sup> See P. SOPER, *A THEORY OF LAW* (1984).

tion. First, with regard to a *theory of law*, Part II of the article suggests that certification reflects a legal positivist approach and is essentially inconsistent with adherence to a natural law theory.<sup>17</sup> Second, regarding a *theory of adjudication*, Part III contends that certification is consistent with a view of the judicial function as an exercise of choice among competing answers of different quality for previously undecided questions, without necessitating the development of an adjudication theory that depicts judicial decisionmaking as the identification and application of the single correct answer in every case.<sup>18</sup> The decision to adopt a certification procedure within a state, or to employ the procedure in a particular federal case, should be better informed as a result of an understanding of the jurisprudential underpinnings of this decision-making technique. A study of those underpinnings demonstrates that the disputes of modern analytic jurisprudence are not irrelevant when divorced from (or preliminary to) attention to political theory, nor are they "merely" verbal disputes.<sup>19</sup>

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<sup>17</sup> Any attempt to develop a legal positivist account of law is necessarily deeply indebted to H.L.A. Hart's efforts to rescue positivism from the fundamentally flawed approach of the imperative theorists such as John Austin, see J. AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* (H.L.A. Hart ed. 1954), and from the paths along which positivism was being led in the work of Hans Kelsen, see, e.g., H. Kelsen, *PURE THEORY OF LAW* (1967), who was the reigning legal positivist, see L. FULLER, *THE PROBLEMS OF JURISPRUDENCE* 105 (temp. ed. 1949), at the time Hart published *THE CONCEPT OF LAW*. See generally H.L.A. HART, *ESSAYS IN JURISPRUDENCE AND PHILOSOPHY* (1983); H.L.A. HART, *THE CONCEPT OF LAW* (1961). Subsequent refinements of, and enlargements upon, Hart's theory of law by Neil MacCormick have, in their turn, helped to rescue Hart from his own insufficient attention to the application of his theory to the activity of adjudication, as well as from the development away from Hart's positions by such contemporary legal theorists as Joseph Raz, see e.g., J. RAZ, *THE CONCEPT OF A LEGAL SYSTEM: AN INTRODUCTION TO THE THEORY OF LEGAL SYSTEM* (2d ed. 1980); J. RAZ, *THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY* (1979). See generally N. MACCORMICK, *LEGAL RIGHT AND SOCIAL DEMOCRACY: ESSAYS IN LEGAL AND POLITICAL PHILOSOPHY* (1982); N. MACCORMICK, H.L.A. HART (1981) [hereinafter cited as N. MACCORMICK, H.L.A. HART]; N. MACCORMICK, *LEGAL REASONING AND LEGAL THEORY* (1978) [hereinafter cited as *LEGAL REASONING*].

<sup>18</sup> The statement in the text is a reaction to the jurisprudential work of Ronald Dworkin. See generally R. DWORKIN, *A MATTER OF PRINCIPLE* (1985) [hereinafter cited as *PRINCIPLE*]; R. DWORKIN, *TAKING RIGHTS SERIOUSLY* (1978) [hereinafter cited as *RIGHTS*]; Dworkin, *A Reply by Ronald Dworkin*, in RONALD DWORKIN AND *CONTEMPORARY JURISPRUDENCE* 247-300 (M. Cohen ed. 1984) [hereinafter cited as *Reply*].

<sup>19</sup> Glanville Williams makes the following somewhat astonishing claims in developing his idea that disputes about the nature of law are verbal disputes:

The word "law" is simply a symbol for an idea. This idea may vary with the person who uses the word . . . Everyone is entitled for his own part to use words in any meaning he pleases: there is no such thing as an intrinsically "proper" or "improper"

# I. DECISION-DUCKING, THE OTHER-LAW PROBLEM, AND CERTIFICATION

A hypothetical case, filed in a federal district court, and involving questions of state law establishes a concrete setting against which to analyze certification. We begin with the geographic setting of an imaginary group of states that together comprise the Federal Fifteenth Circuit. Within the circuit are two adjacent states, Anomie and Bliss. A large metropolitan area of Anomie is located near the Bliss border. The finest medical facilities in the region are at a medical school in this metropolitan area, and Bliss citizens routinely travel to Anomie for treatment. The federal district court action that will serve as the basis for the discussion arises from a collision in Anomie between a truck and an automobile. The truck is owned by a firm incorporated in Delaware with its principal place of business in Ohio. The truck driver resides in Pennsylvania. The occupants of the automobile are three pregnant women returning to their homes in Bliss<sup>20</sup> after having been ex-

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meaning of a word.

Williams, *supra* note 15, at 136.

If meaning were an end in itself, then Williams' idea of mere verbal disputes over totally subjective meanings might have a role to play in a study of legal semantics; but the flaw in Williams' statement is its failure to acknowledge the function of words in law. Words do, of course, express *ideas*, but words also serve as the basis for *communication*. If I use a word in one way and you use it in another, we would be unlikely to be very effective at communicating with each other or to a third person. Still another function should be considered: the communication might have as its purpose the development of a plan of *action*. It has often been the case that those who delve into questions about the nature of law have very definite ideas about how a legal system ought to operate, and that vision is often something quite different from the way the system then works. See W. MORISON, JOHN AUSTIN 122-47 (1982). Obtaining agreement on a course of action, particularly when the action involves significant and substantial change, will usually be more difficult if communication is hampered by the assignment of different meanings to words. This progression from ideas to words to communication to action suggests the risk that accompanies the view that words can be used in any meaning that the speaker pleases. To say that we can simply disagree about the meaning of words ignores the consequences of that disagreement. Particularly in our role as lawyers, we are going to be interested in what we can *do* with legal words. See generally W. TWINING & D. MIERS, HOW TO DO THINGS WITH RULES (2d ed. 1982), the title of which is obviously patterned on J.L. AUSTIN, HOW TO DO THINGS WITH WORDS (2d ed. 1975). Williams' relegation of analytical jurisprudence to an exercise in verbal dispute skates over the surface of the lawyerly enterprise. For a more sophisticated attempt to place analytical jurisprudence in the context of linguistic philosophy, see Morris, *Verbal Disputes and the Legal Philosophy of John Austin*, 7 UCLA L. REV. 27 (1960).

<sup>20</sup> Thus, there is diversity of citizenship between the occupants of the automobile, on the one hand, and the owner and the driver of the truck, on the other. An action by any of the



amined by their obstetricians at the hospital associated with the medical school.<sup>21</sup> The collision causes serious harm to each of the occupants of the car. One of the injured women institutes a diversity action against the truck driver and the owner of the truck in the federal district court for the Western District of Bliss, where she resides.<sup>22</sup> The plaintiff asserts a claim on her own behalf for damages for her personal injuries and a claim in her capacity as personal representative for damages for the wrongful death of the four-and-a-half-month-old fetus that was spontaneously aborted as a result of the injuries the plaintiff suffered in the collision. The defendants' first response to the complaint includes a motion to dismiss the wrongful death claim for failure to state a claim upon which relief can be granted.<sup>23</sup>

A consideration of three different dispositions that the federal judge might make at this stage in the proceedings helps to outline the nature of certification and the jurisprudential ideas underlying it. In *Disposition 1*, the district judge transfers the case from the district in Bliss, where it is pending, to the Eastern District of Anomie, where the accident occurred. In *Disposition 2*, the trial judge performs the *Erie* analysis necessary to resolve the issue of the legal sufficiency of the wrongful death claim. In *Disposition 3*, the federal judge certifies the question of the legal sufficiency of the wrongful death claim to the state supreme court of the state whose law will govern the issue.<sup>24</sup>

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occupants against the owner and the driver may therefore be brought in federal court. 28 U.S.C. § 1332(a)(1) (1982).

<sup>21</sup> The significance of the obstetric examination immediately prior to the accident lies in the availability of strong evidence that the fetus and the mother were both in good condition just before the collision. Although this may appear to be a clear example of the legal academic's typically unrealistic assumption, the occurrence of an accident shortly after a medical examination had detected an audible fetal heartbeat is drawn from an actual case. See *Panagopoulos v. Martin*, 295 F. Supp. 220 (S.D. W. Va. 1969).

<sup>22</sup> Venue is therefore proper, as a diversity action filed in the judicial district where the only plaintiff resides. 28 U.S.C. § 1391(a) (1982). I am also assuming that the plaintiff is able to obtain personal jurisdiction over both the corporate and the individual defendants in Bliss, based on their contacts with the state. If this assumption causes any difficulty for the reader, simply delete the individual defendant from the action. For the use of a venue transfer to cure personal jurisdiction defects, see *infra* note 25.

<sup>23</sup> FED. R. CIV. P. 12(b)(6).

<sup>24</sup> As will be discussed below, the certification may be either to the Supreme Court of Bliss or, as is more likely, to the Supreme Court of Anomie. See *infra* note 36.

*A. Disposition 1: Convenience Transfer of Venue*

The decision to transfer a case properly filed in one federal district court<sup>25</sup> to another federal district where the claim might have been brought<sup>26</sup> displays a form of decision-ducking that is only tangentially affected by the other-law problem. One of the reasons supporting a decision to transfer is a preference for trying the case in a court more familiar with the law governing the issues in the case.<sup>27</sup> Thus, in that regard, there may be a slight other-law tinge to the use of this decision-ducking technique.

Consider the judicial reasoning that could lead to this disposition. If a Bliss choice-of-law rule provides that the law of the state where the accident and the death occurred governs the personal injury and wrongful death claims, the federal judge in Bliss might use that as one factor to justify a transfer to the federal court in Anomie. The ostensible premise underlying the justification would be the likelihood that a federal judge in Anomie would be more familiar with Anomie law than would a federal judge who sits in another state.<sup>28</sup> Whatever empirical validity might attach to this premise, its significance as a rationale for decision-ducking is in any event called into question by a consideration of the intrasystemic nature of convenience transfer.

Convenience transfer is a decision-ducking technique only partially driven by the other-law considerations, but it is a technique that is purely intrasystemic in its operation. The transferor court is able to engage in case avoidance, but the transferee court is within the same judicial system as the first court. The upshot of conve-

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<sup>25</sup> By "properly filed in one federal district court," I mean that venue is proper and that the court has jurisdiction over the defendant. Some federal courts have used the transfer provision of 28 U.S.C. § 1404(a) (1982), *supra* note 11, to cure defects in jurisdiction over the defendant. See 1 J. MOORE, J. LUCAS, H. FINK, D. WECKSTEIN & J. WICKER, *MOORE'S FEDERAL PRACTICE* ¶ 0.145[4.-5] (1985) [hereinafter cited as 1 MOORE'S]. When venue is improper in the district in which the action was filed, transfer may take place under 28 U.S.C. § 1406(a) (1982).

<sup>26</sup> 28 U.S.C. § 1404(a) (1982), *supra* note 11. See generally 1 MOORE'S, *supra* note 25, at ¶0.145[6].

<sup>27</sup> See 1 MOORE'S, *supra* note 25, at ¶ 0.145[5] (including within the "interests of justice" factor of § 1404(a) the "appropriateness in having the trial of a diversity case in a forum that is at home with the state law that must govern the action," and "avoidance of unnecessary problems in conflict of laws and in law foreign to the forum court").

<sup>28</sup> See, e.g., C. WRIGHT, *supra* note 6, at 375-76 (noting the reluctance of federal appellate courts to displace the resident federal judge's view of state law).

nience transfer, at least in a case in which state law provides the rule of decision on one or more issues, is that the decision-ducking by the transferor court does not remove from the federal judicial system the need to resolve the other-law problem. Instead, that problem is simply transferred with the case to the transferee court. This transfer raises the question of why the transferee federal court's supposed familiarity with the law of the state in which it sits should provide any support for the transfer. Two responses could be offered.

The first draws on a variant of the idea that a federal court hearing a diversity case is treated as another state court of the state in which it sits.<sup>29</sup> The argument apparently is that the case is transferred to the state whose law will govern, so that in the federal diversity action the transferee court will be another court of that state. Even if one is willing to grant the characterization of the federal court as just another state court, an examination of the hypothetical wrongful death claim demonstrates that this argument leads to a conceptual tangle. The key factor in the hypothetical is that the action was properly filed in a federal court in Bliss. This factor requires the Bliss federal court to determine what law the Bliss choice-of-law rules would require the court to follow.<sup>30</sup> Assuming that the Bliss choice-of-law rules point to Anomie law as governing the wrongful death claim, the federal court sitting in Bliss would try the case under the Anomie law, just as a Bliss state court would have done. In that respect, then, the claim that the federal court in Bliss acts as another Bliss state court has at least some plausibility.

In this first suggested disposition, however, the federal court in Bliss transfers the case to a federal court in Anomie. When a transfer under 28 U.S.C. § 1404(a) is made, the transferee court is usually called upon to apply the law that the transferor court would have applied.<sup>31</sup> The federal court in Anomie as the transferee court

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<sup>29</sup> *Guaranty Trust Co. v. York*, 326 U.S. 99, 108 (1945) ("a federal court adjudicating a state-created right solely because of the diversity of citizenship of the parties is for that purpose, in effect, only another court of the State").

<sup>30</sup> *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941) (state choice-of-law rules are part of the state law that a federal court is *Erie*-bound to apply).

<sup>31</sup> See 1 MOORE'S, *supra* note 25, at ¶ 0.145[4.-5]. The exception to the rule stated in the text seems now to be virtually limited to the situation in which a *plaintiff* requests a transfer under § 1404(a) to move the case to a district where jurisdiction over the defendant

would thus apply Anomie law. On the surface, the transferee federal court seemingly is acting as just another Anomie state court. A further examination, however, shows such a convoluted relationship within and across systemic boundaries that the "just another state court" hypothesis begins to lose its credibility as a description of the relationship between the federal and state courts. The reason the Anomie federal court will apply Anomie law to the case is that the federal court in *Bliss* decided that the choice-of-law rules of *Bliss* called for application of Anomie law. Because the transferee court applies the law of the transferor forum, the Anomie federal court would be in the anomalous position of acting as another state court of *Bliss*, not Anomie. This apparently bizarre conclusion becomes even more ludicrous if we assume that the Anomie choice-of-law rules are different from those of *Bliss*, and that Anomie courts, for whatever reasons, would apply the law of *Bliss*, the state in which the plaintiff resides. Credulity is strained beyond its tolerance when we try to pretend that the federal court in Anomie is just another Anomie state court when applying a body of law that is different from the law that would be applied by the Anomie state courts. Accordingly, the contention that the convenience transfer can be justified by the rationale that the transferee court is in effect another state court requires the acceptance of the implausible hypothesis that we will treat a federal court as another state court of a state other than the one in which it sits.

The second argument that might be offered to support a convenience transfer based on the transferee court's greater familiarity with the law of the transferee state relies on the hypothesis that, because of that familiarity, the judge in the transferee court is in some way more capable of performing the judicial decisionmaking tasks that the case presents. In the context of the hypothetical case, the federal judge in *Bliss* transfers the case, and thereby ducks the decision, because of a belief that the federal judge in Anomie is, at least for purposes of this case, a better decisionmaker. The obvious inquiry, then, is what accounts for the perception that one set of judges is more competent because of their location. To pursue that inquiry, it is helpful to classify the state law questions presented in the case as settled or unsettled.<sup>32</sup>

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could be obtained. See *In re Air Crash Disaster*, 559 F. Supp. 333, 340 n.5 (D.D.C. 1983).

<sup>32</sup> I have chosen this settled/unsettled question terminology, rather than the alternative

A settled question of state law is an issue for which there is clear, controlling precedent in the law of the state.<sup>33</sup> Another way of deciding whether a question is settled is to determine if an inferior court within the state judicial system would be compelled to decide the question in a particular way. If a decision would trigger the response from a higher court that departing from precedent is not within the function of a lower court,<sup>34</sup> then the question is settled in the sense that any change is within the province of the highest court of the state. Unsettled questions are of different types, two of which are of particular concern to this inquiry. One involves an issue that has never been addressed within a system, or at least has never been decided by an appellate court in a way that establishes a rule for lower courts to follow in future cases. Distinguishable from these *questions of first impression* are questions that are unsettled even though there has been an authoritative decision on the issue. This latter type of question is unsettled because the answer that has been given is, for one reason or another, considered unsatisfactory for contemporary application. Perhaps one can speak of this type of issue as presenting unsettled questions in the sense that the controlling precedent provides *unsettling answers*.

If the "better decisionmaker" hypothesis is applied to a federal case involving settled state law questions, this rationale for decision-ducking suggests that the transferee court personnel are bet-

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dichotomy between "hard cases" and "easy cases," for a number of reasons. First, the ultimate focus of this article is on a judicial technique for certifying questions of law, so questions seem to be a more appropriate object of attention than cases. Second, the hard/easy distinction is, at best, ambiguous. In his analysis of adjudication in hard cases, Professor Dworkin is surprisingly imprecise about what he means by a hard case, referring variously to a case in which no established rule of law can be found, see R. DWORKIN, *RIGHTS*, *supra* note 18, at 44, and to a case in which "no settled rule dictates a decision either way." *Id.* at 83. A later statement about hard cases says that they "typically arise, not because there is nothing in the rule book that bears on the dispute, but because the rules that are in the book speak in an uncertain voice." R. DWORKIN, *PRINCIPLE*, *supra* note 18, at 13.

<sup>33</sup> Given the language of the various provisions authorizing certification in cases in which there is no clear controlling precedent in the decisions of the state courts, the settled question will not be the occasion for the type of decision-ducking that certification involves.

<sup>34</sup> See, e.g., *Gilliam v. Stewart*, 291 So. 2d 593, 594 (Fla. 1974) (rejecting attempt by intermediate appellate court to allow recovery, contrary to previous supreme court decisions, for mental suffering, where no physical injuries were present); *Wood v. Camp*, 284 So. 2d 691, 695 (Fla. 1973) (rejecting the attempt by an intermediate appellate court to abolish all distinctions among tort duties owed by landowners based on the status of the person injured on the premises).

ter able to *locate* the authoritative precedent. Such a suggestion ought to be dismissed fairly lightly, given the cadres of judicial law clerks who, even if not sufficient masters of Boolean logic to assure thoroughness and accuracy in the use of computerized legal research, should at least be able to comb digests, reporters, and other low-tech research tools. The suggestion that a federal judge in Anomie is a better locator of Anomie law than a federal judge in Bliss is at least questionable and probably mildly insulting to the capacities of judges and judicial support-service personnel.

Thus the "better decisionmaker" hypothesis supports the use of a decision-ducking technique such as convenience transfer only in cases involving unsettled state law questions. In this situation, the hypothesis suggests that the federal judge of the transferee court is better able to *predict* how the question would be decided than the federal judge whose court sits in another state. The idea of a judge as a law predictor rather than, or in addition to, a law locator is best explored in the context of the second disposition of our hypothetical case, in which the federal district judge makes an *Erie* determination of the state law issue.

#### *B. Disposition 2: Erie Determination of State Law*

The federal judge who follows the *Erie* doctrine mandate to use state court decisional law as part of the rule of decision must squarely confront the other-law problem. The judicial activity in this situation differs from that described in the convenience transfer disposition because the *Erie* determination involves decision-making rather than decision-ducking.

Judicial decisionmaking in the other-law setting is different from judicial decisionmaking without the other-law complication. In the hypothetical case, with regard to the wrongful death claim the determinative question is whether the plaintiff has a legally valid claim for damages for the death of an unviable fetus caused by the wrongful conduct of another. If we were to express in symbolic form the answers to that question, we could use the symbol "S" (for "sufficient") to indicate an answer upholding the legal sufficiency of the claim, and the symbol "NS" (for *not* sufficient) to indicate that the claim is legally insufficient. In a case that lacks the other-law feature, the judicial activity involves the selection of

S or NS.<sup>35</sup> Introducing the other-law component into the case directs the judge's attention away from the selection of S or NS to a consideration of how the courts of the other legal system would resolve the question. If the question is unsettled in the sense first discussed, that is, because an appellate court of the other system has not answered the question, then the court is put in the position of deciding what the courts of the other system would decide on a question that has not been addressed by those courts.<sup>36</sup> If the question is unsettled in the second sense, that is, because the federal court thinks the appropriate state law provides an unsatisfactory answer, then the federal court must either apply the unsatisfactory answer to the case pending before it<sup>37</sup> or indulge in the

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<sup>35</sup> I will set aside, for now, the issue of whether the "selection" entails the exercise of a choice or a discovery of the single right answer. For the discussion of this issue, see *infra* notes 109-17 and accompanying text.

<sup>36</sup> Because the hypothetical case involves a choice-of-law rule that refers the Bliss courts to Anomie law, the other-law component is even more complex if the federal court in Bliss must determine what the Bliss state courts would decide on what the Anomie state courts would decide. That complexity has been described in language that comes close to being a parody of the *Erie/Klaxon* requirements: "Our principal task, in this diversity of citizenship case, is to determine what the New York courts would think the California courts would think on an issue about which neither has thought." *Nolan v. Transocean Air Lines*, 276 F.2d 280, 281 (2d Cir. 1960), *vacated*, 365 U.S. 293 (1961) (remand to the 2d Circuit for that court to consider "what relative weights, as authoritative sources for ascertaining California law, the New York Court of Appeals would accord to" California intermediate appellate court decisions of 1930 and 1938 and a California supreme court decision handed down shortly before argument in the 2d Circuit). The accuracy of the Second Circuits characterization depends on assigning a higher priority to accepting the role of the federal court in New York as being another state court of New York than it does to the commitment to a decision of the issue in the way that the California courts would decide. If we make the plausible assumption that the New York courts have issued no pronouncements about how the California courts would decide a question, the apparent tension between the obligation to act as another court of New York and the requirement to apply the law of California should disappear, leaving the federal court "obliged, as best it can, itself to blaze the trail of the foreign law that it has been directed to follow." *Id.* at 281.

The quotations from the court of appeals in *Nolan* are taken from an opinion written by Henry Friendly, a distinguished federal judge and careful student of the role of federal courts. See, e.g., H. FRIENDLY, *FEDERAL JURISDICTION: A GENERAL VIEW* (1973) [hereinafter cited as H. FRIENDLY, *JURISDICTION*]; Friendly, *In Praise of Erie—And of the New Federal Common Law*, 39 N.Y.U. L. REV. 383 (1964). Judge Friendly's collapsing of the two levels of the other-law problem into the single requirement of determining what California (or Anomie, in our hypothetical case) courts would decide is a sensible way to avoid at least part of the complexity which is engendered by the *Erie/Klaxon* doctrines. Judge Friendly's solution properly gives primary consideration to the decision that would be reached by the courts of the state whose law *Klaxon* requires the federal court to apply.

<sup>37</sup> See, e.g., *Joyce v. A.C. & S., Inc.*, 591 F. Supp. 449 (W.D. Va. 1984) (expressing, as a

belief that the state courts would adopt a different answer if the question were presently posed to them.<sup>38</sup>

A detailed consideration of these three different types of judicial activity involved in making an *Erie* determination of an unsettled question suggests that the most critical factor in the answer is not the *content* of the answer but rather the *source* (or the putative source) of the answer. In symbolic terms, the S/NS dichotomy becomes less important than some other options, including (a) an *Erie* prediction by the federal court as to how the Anomie courts would decide the question,<sup>39</sup> which can be symbolized as "SF" (for "sufficient as determined by a federal court") and "NSF" (for "not sufficient as determined by a federal court"), (b) a federal court answer that follows an actual decision of the Anomie courts on the specific question presented in the federal case,<sup>40</sup> which can be symbolized as "SA" (for "sufficient as determined by an Anomie court") and "NSA" (for "not sufficient as determined by an Anomie court"), and (c) an *Erie* belief that the Anomie courts would shift their position and adopt a new answer to the question they had previously decided in a way the federal court finds unsatisfactory,<sup>41</sup> which can be symbolized as "CSF" (for "change to sufficient as determined by a federal court") and "CNSF" (for "change to not sufficient as determined by a federal court"). The symbolic expression of the competing decisions can illustrate the difference between a content-based independent federal court decision regarding the sufficiency of the plaintiff's claim for relief and a source-based decision that is dependent on what the Anomie courts would decide.

Consider first the *Erie* prediction SF/NSF dichotomy. A federal judge deciding which of these answers to apply to the case acts (or, at the very least, speaks<sup>42</sup>) in a way that is different from the judge

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matter of "good conscience," the federal district judge's "displeasure at the inequity of the rule" of state law that the court was obligated to apply).

<sup>38</sup> See, e.g., *McKenna v. Ortho Pharmaceutical Corp.*, 622 F.2d 657 (3d Cir.), cert. denied, 449 U.S. 976 (1980) (the statute of limitations in a personal injury case against a contraceptive manufacturer was tolled until the plaintiff knew or should have known the cause of the injuries, in spite of state supreme court decision nine years earlier rejecting a "discovery rule" for application of statute of limitations in a medical malpractice case).

<sup>39</sup> See *supra* note 36 and accompanying text.

<sup>40</sup> See *supra* note 37 and accompanying text.

<sup>41</sup> See *supra* note 38 and accompanying text.

<sup>42</sup> I am assuming, as I think one must, that federal judges both understand and take



deciding whether simply to apply S or NS. To decide SF, for example, the federal court would have to conclude that the answer of the state courts in *Anomie* would more likely be S than NS. This focus on the probability of the state court deciding S supports a reference to the federal court decision SF as a prediction or a forecast.<sup>43</sup> The point I wish to emphasize concerns how it is relevant to a theory of law that SF is a different decision from S, even though the content (i.e., that plaintiff's wrongful death claim is legally sufficient) appears to be the same.<sup>44</sup> While a state appellate court's decision of S can thereby make S the law of that state, the federal court's decision of SF cannot likewise make SF the law of that state. The consideration of *Erie* determinations of questions of first impression demonstrates that in these situations it is misleading to speak as if there were a difference between "law" and the "law of" a system. S is both "law," in that the relative rights and responsibilities of the parties to this lawsuit are determined, and it is the "law of" the system whose courts reach that decision, because future litigants will have their rights and responsibilities adjudicated in the same way, absent some compelling reason to depart from the precedent established by the earlier decision. The federal decision SF is "law"; the rights and responsibilities of the parties to the federal diversity action are determined just as if they had chosen to litigate in the state courts of the system whose law controls. It is, however, erroneous to speak of SF as the "law of" the relevant state. SF is at best the putative law of the state. De-

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seriously the obligations of the *Erie* doctrine. A purely result-oriented decisionmaker could, of course, say that the result he or she desired was the result that would be reached in the courts of the state whose law was controlling. But when the judicial decision moves beyond simple assertion and instead includes some attempt to explain and justify the result, the federal judge carrying out an *Erie* determination must make use of a different set of materials and arguments in supporting the result than would have been used to support an independent determination.

<sup>43</sup> See *McKenna v. Ortho Pharmaceutical Corp.*, 622 F.2d 657 (3d Cir.), *cert. denied*, 449 U.S. 976 (1980). In *McKenna*, the court stated: "The problem of ascertainment arises when, as here, the highest state court has not yet authoritatively addressed the critical issue. . . . [O]ur disposition . . . must be governed by a prediction of how the state's highest court would decide were it confronted with the problem." *Id.* at 661. "[A] federal court attempting to forecast state law must consider relevant state precedents, analogous decisions, considered dicta, scholarly works, and any other reliable data tending convincingly to show how the highest court in the state would decide the issue . . . ." *Id.* at 663.

<sup>44</sup> See *infra* notes 71-95 and accompanying text, for a consideration of whether it makes sense to speak about the SF decision as "right" or "correct."

spite the federal court's reference to the probable result that the state courts would have reached, the decision SF derives its designation as the "law of" some system from the same source from which it derives its authority as "law." SF is the "law of" the federal court, not the law of the state, because it is the federal system's allocation of judicial authority to the federal district court that was invoked to give the character of "law" to the judicial decision in that federal case. When a federal court makes an *Erie* determination of a question of first impression, the "law of the state" that the federal court purports to apply to the case is, in reality, federal law. The federal court determines the content of this law by referring to criteria that operate within a system separate from the federal court system.

Perhaps another way to illustrate the distinction between S and SF is to recognize that S is both the basis of the *decision* in the particular case that is before the state court and a *rule* of state law that applies whenever state law is the rule of decision. The federal court's decision SF lacks the latter feature. Even when federal courts rely on the decisions of other federal courts on questions of state law,<sup>45</sup> the decisions of those other federal courts are at most only reasons for a particular outcome, rather than the source of *rules* that dictate a particular result.<sup>46</sup>

The characterization of the federal court's *Erie* prediction as some sort of ersatz state law is strengthened by a comparison of that activity with the federal judicial role in deciding the other type of unsettled question of state law. The situation that comes closest to giving substance to the *Erie* myth that the law of a state can be decided by a federal court is a case in which the federal court can identify a state court precedent that is determinative of the question presented. Assume that the Anomie Supreme Court had decided that no wrongful death action would lie for prenatal injuries unless the child were born alive. The decision NS would appear to control the federal court's disposition of the wrongful death diversity claim. Nevertheless, even though the federal court's decision NSA is drawn from the state supreme court's decision NS, the federal court is still applying federal law with a state-influenced content. If the federal court should decide to reject the out-

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<sup>45</sup> See, e.g., C. WRIGHT, *supra* note 6, at 376-77.

<sup>46</sup> For the distinction between rules and reasons, see *infra* note 60.

come called for by the adoption of the state court precedent, the federal court would be able to engage in routine adjudicatory techniques such as distinguishing the instant case from the precedent. If those techniques fail, or are too implausible under the circumstances, the federal court may resort to the decision CSF, acknowledging that the controlling state supreme court precedent was a decision NS, but predicting that the state supreme court would, if given the opportunity, reverse its stance and decide S.

*C. Disposition 3: Certification of the State Law Question*

Having examined the decision-ducking disposition of convenience transfer, and the decisionmaking disposition of an *Erie* determination of what purports to be the law of another system, the characterization of certification as a decision-ducking technique to avoid the other-law problem should be less troublesome than it might have seemed at first. The federal judge in Bliss who decides to certify the legal sufficiency question to the Supreme Court of Anomie can avoid entirely the legal issue of whether the plaintiff has stated a wrongful death claim upon which relief can be granted.<sup>47</sup> The other-law problem is alleviated by the referral of that question to the highest court of the system whose law governs. Assuming that the state supreme court answers the question,<sup>48</sup> the federal court then simply applies that answer in the case before it.

Whether certification is a useful technique and whether it is worth the extra time and expense of involving the highest court of another system<sup>49</sup> are questions that can be debated by judges and

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<sup>47</sup> Certification is an issue-avoidance, rather than a case-avoidance, type of decision-ducking device. See *supra* notes 10-13 and accompanying text. Factual issues must still be determined within the context of the federal case, and any other legal issues that were not certified to the state supreme court will also need to be decided by the federal court.

<sup>48</sup> Authorization of a certification procedure carries with it no obligation to answer the question that is certified by another court. For an early refusal to answer a certified question, see *In re Richards*, 223 A.2d 827, 833 (Me. 1966) (refusing to answer question when material facts were neither agreed upon nor found by the certifying court, thus providing no assurance that the answer would be "determinative of the cause").

<sup>49</sup> Although not present in the hypothetical wrongful death claim, abstention considerations could provide some of the more compelling reasons to employ certification. If a federal court decides to abstain and stay the federal proceedings pending the issuance of a state court resolution of a state law question, the use of a certification technique should substantially reduce the expense and the delay that abstention would involve. See M. REPISII, *supra* note 6, at 258. Rather than forcing the parties to institute a state court action and presumably also make use of whatever appellate avenues were available after the state trial court's

commentators. The hypothetical wrongful death claim seems to present a combination of factors that provide the strongest support for the use of certification outside of the abstention setting.<sup>50</sup>

First, the certification is both intersystemic<sup>51</sup> (i.e., from a federal court to a state court) and interstate<sup>52</sup> (i.e., from a court in Bliss to a court in Anomie). The location of a court both in another system and in another state presents the greatest likelihood that the judge will be unfamiliar with the law that will be applied.<sup>53</sup> Thus, to the extent a court's unfamiliarity with the law that governs the issues is a factor supporting decision-ducking, the interstate, intersystemic situation (ignoring other factors for the moment) presents the strongest case in favor of certification.<sup>54</sup>

Second, the legal sufficiency of the wrongful death claim is part of a complex set of issues on which there has been fairly rapid and substantial change.<sup>55</sup> Under such circumstances, a federal court

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disposition of the matter, the use of certification in an abstention situation enables the parties to bypass the lower courts in the state system and present the critical question directly to the highest state court.

<sup>50</sup> See *supra* note 49.

<sup>51</sup> See *supra* note 14.

<sup>52</sup> *Id.*

<sup>53</sup> See, e.g., *Bishop v. Sales*, 336 So. 2d 1340 (Ala. 1976) (question of Alabama law of products liability certified to Supreme Court of Alabama by federal district court sitting in Georgia).

<sup>54</sup> To some extent, unfamiliarity supports certification from federal appellate courts as a fairly routine matter. At the trial court level, most certified questions have arisen in an intrastate context, i.e., the federal court is required to apply the law of the state in which it sits. When the question of state law forms part of the case that the federal appellate court is required to review on appeal from the district court decision, the appellate judges who are drawn from a wider geographic area are unlikely to possess the same degree of familiarity with the governing state law as a district judge sitting in that state.

<sup>55</sup> The first American recognition of a claim based on prenatal injuries did not occur until slightly less than forty years ago. See *Bonbrest v. Kotz*, 65 F. Supp. 138, 140 (D.D.C. 1946) (allowing recovery for injury to child during removal from womb). The rapidity of change within a state is illustrated by the experience in Alabama. As late as 1972, Alabama was the last state to have refused to recognize an action for prenatal injuries on behalf of either the child or its personal representative. In 1972, the supreme court upheld a wrongful death action on behalf of a child who had suffered prenatal injuries at a time when he was viable and had died after having been born alive. *Huskey v. Smith*, 289 Ala. 52, 265 So. 2d 596 (1972). In the next year, the supreme court extended its recognition of a wrongful death claim to cover a child who was born alive, but then died as a result of prenatal injuries inflicted prior to viability. *Wolfe v. Isbell*, 291 Ala. 327, 280 So. 2d 758 (1973). A year later, the supreme court decided that live birth was not a prerequisite for a wrongful death claim for prenatal injuries inflicted upon a fetus that was viable. *Eich v. Town of Gulf Shores*, 293 Ala. 95, 300 So. 2d 354 (1974).

might consider itself less able to predict how far the state courts would go in recognizing a new claim or extending the boundaries of an existing claim.

Third, the question ultimately turns on the interpretation of a state statute.<sup>56</sup> When a legal issue involves the combined efforts of two institutions—for example, a legislature and a court, or an administrative agency and a court—the additional complicating factor of the court being outside the system to which the other institution belongs can increase the difficulty of performing the judicial task in the way that it would be performed by a court within the same system.<sup>57</sup>

Fourth, the question of state law is one on which a number of distinguishing factors could be used to draw lines between valid and insufficient claims. Among the possible distinctions are whether the prenatal injury occurred prior to viability of the fetus or after viability and whether the live birth of the prenatally injured fetus is a necessary element of a wrongful death claim. Structuring the hypothetical automobile accident so that the plaintiff was one of three pregnant women injured in the collision, each of whom could have been in a different stage of pregnancy, demonstrates that the decision of any one of the claims arising out of the accident may turn on arbitrary line-drawing, unless the full range of potentially significant features of the case were taken into account.<sup>58</sup>

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<sup>56</sup> A wrongful death action is a creation of the state legislature. See generally W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER & KEETON ON THE LAW OF TORTS 945-47 (5th ed. 1984) (tracing the development of wrongful death actions and classifying the various types of wrongful death statutes). The wrongful death acts typically provide for a claim when the wrongful conduct of the defendant has resulted in the death of a "person." Thus, the statutory question presented in the hypothetical wrongful death claim would be whether the nonviable fetus that was killed as a result of the collision was a "person" as that term is used in the applicable state wrongful death act.

<sup>57</sup> This factor, concentrating on the difficulty of meshing the roles of two institutions located in different systems, would be useful in supporting the form of abstention in which a federal court refuses to exercise jurisdiction over cases that involve only isolated portions of complex state administrative or regulatory schemes. See *Burford v. Sun Oil Co.*, 319 U.S. 315 (where a state has a unified system of specific statutes, commissions, and expeditious methods of judicial review on a certain subject, a federal court should abstain from taking a case on that subject); M. REDISH, *supra* note 6, at 243-49 (noting several ambiguities about *Burford* abstention and suggesting criteria that need to be satisfied before invoking *Burford* abstention).

<sup>58</sup> For a discussion of how one state supreme court worked its way, step-by-step, through the various combinations of the factors regarding fetal viability at time of injury and live

Fifth, the question carries the risk that the manner in which the federal court answers it can produce just the kind of forum shopping that the *Erie* doctrine is designed to eliminate.<sup>59</sup> Should the federal court rule in favor of the plaintiff, deciding that she has stated a wrongful death claim upon which relief can be granted, future plaintiffs with similar claims who are able to secure a federal forum would have an incentive to take advantage of the favorable federal precedent rather than risk a contrary ruling within the state court system. While admittedly the parties to routine automobile accident cases have only a limited potential for choosing a federal forum, fairly common state law claims such as products liability actions can easily be structured so that diversity of citizenship is present. Federal court decisions in cases of that sort may produce filing and removal choices designed to take advantage of the established federal ruling, even to the extent that the persistent resort to a federal forum postpones the presentation of the state law issue to the state courts. Certification of the issue to the highest state court eliminates the situation in which the applicability of the decision may be limited to only one of the systems and, by assuring that the same substantive law will be applied by the federal and the state courts, removes the pressure to seek a federal forum based on a perceived advantage in the federal forum's substantive law.

Thus, for a number of reasons, certification can be a useful way of achieving some practical benefits. A separate question is whether certification has a legitimate theoretical basis or whether the device is an unfounded abdication of federal judicial responsibility, as well as an insupportable imposition on the time and energy of state courts. The remainder of this article will consider the way that certification is apparently built upon at least tacit acceptance of a particular set of jurisprudential assumptions.

## II. CERTIFICATION AND THE NATURE OF LAW

A central tenet of contemporary legal positivism is the reliance on a test for identifying legal standards<sup>60</sup> based on the origin or the

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birth, see *supra* note 55.

<sup>59</sup> See *Hanna v. Plumer*, 380 U.S. 460, 467-68 (1965) (noting the importance of the discouragement of forum-shopping).

<sup>60</sup> I have purposely used the less specific term "standards" to encompass both rules and

pedigree of the standards.<sup>61</sup> In this regard, positivism can be distinguished from a roughly-hewn version of a natural law theory which, to the extent that legal validity matters at all, employs a test that focuses on what the legal standard is, rather than how it was created.<sup>62</sup> The crucial difference between legal positivism and a natural law theory, for purposes of an analysis of certification, lies in the manner in which the validity of law is determined. Natural law theory attaches validity to law when its *content* "passes a moral test,"<sup>63</sup> while legal positivism considers validity to depend on whether the law's *source* was authorized to make law and on whether formal requirements were satisfied in the specific instance.<sup>64</sup>

A state adopting a certification procedure, a federal court employing the certification technique, and a state supreme court answering a certified question are all engaged in an enterprise that implicitly assumes that the legal positivist tenet accurately states the nature of law. In the process of supporting this thesis, it is

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principles. The distinction between these different kinds of standards is not important for the ideas being developed within this article, nor is it necessary, for the purpose of this article, to make a great deal out of the distinction between principle and policy. Compare R. DWORKIN, *RIGHTS*, *supra* note 18, at 22-45, 81-130 (distinguishing between policies and principles as basis of judicial decisions) with Greenawalt, *Policy, Rights, and Judicial Decision*, 11 GA. L. REV. 991 (1977) (criticizing Dworkin's use of the distinction between principles and policies, both as a description of what courts do and as a statement of what courts ought to do). I believe that the broader term "reasons" can be used in an uncontroversial way to encompass both principle and policy, in the same way that the term "standards" encompasses both rule and principle, when the distinctions within each category are not relevant to the point being made about the broader category.

<sup>61</sup> See generally R. DWORKIN, *RIGHTS* *supra* note 18, at 17-22 (examining the central propositions and key tenets of positivism); N. MACCORMICK, *LEGAL REASONING*, *supra* note 17, at 54 (discussing the central theory of positivism); N. MACCORMICK, H.L.A. HART, *supra* note 17, at 6 (discussing legal positivism within a biographical sketch of H.L.A. Hart).

<sup>62</sup> See P. SOPER, *supra* note 16, at 51-55 (describing natural law as a nontheory which focuses on one feature of legal systems). Extended treatments of natural law theory include A. D'ENTREVES, *NATURAL LAW* (2d rev. ed. 1970) and J. FINNIS, *NATURAL LAW AND NATURAL RIGHTS* (1980). For Professor Dworkin's attempt to place his theory of adjudication within a natural law framework, see Dworkin, "Natural" Law Revisited, 34 U. FLA. L. REV. 165 (1982).

<sup>63</sup> J. MURPHY & J. COLEMAN, *THE PHILOSOPHY OF LAW: AN INTRODUCTION TO JURISPRUDENCE* 13 (1984).

<sup>64</sup> See N. MACCORMICK, *LEGAL REASONING*, *supra* note 17, at 53-72. But see Coleman, *Negative and Positive Positivism*, 11 J. LEGAL STUD. 139 (1982) (identifying different constraints on the rule of recognition and offering as an alternative version of positivism the proposition, "law is ultimately conventional: That the authority of law is a matter of its acceptance by officials").

necessary to avoid the appearance of making two other claims. These stronger claims, which do *not* form part of or follow from the thesis are, first, that the jurisprudential ideas raised in connection with certification necessarily apply to the broader spectrum of federal court *Erie* determinations, and second, that the federal court deciding questions of state law is incapable of satisfying the requirements of legal validity. To confine the thesis to its properly limited scope, one must appreciate the differences between the ordinary *Erie* determination and the extraordinary technique of certification.

Certification and *Erie* determinations have a number of obvious and significant differences. The former is a form of decision-ducking, while the latter is a type of decisionmaking. The use of certification is discretionary with the federal court,<sup>65</sup> but adherence to the requirements of the *Erie* doctrine is compelled by common-law and statutory standards, if not by the Constitution.<sup>66</sup> The critical difference, however, results from the systemic location of the judicial decisionmaker in the two situations. When certification is used by a federal court and accepted by the state court, the highest court of that state answers the question that is ostensibly a matter of state law. The state court's answer to the question is properly deemed a rule of law of the state; only an acceptance of the *Erie* myth that the federal court is deciding what the state law is can support the characterization of the federal court's *Erie* determination as something other than federal law. One way that difference is likely to matter concerns the effect the two different decisions have on subsequent litigants who present, and on the trial courts that then have to decide, the question at issue in the federal case. A decision by the state supreme court in response to the certified question will carry with it the same precedential value as other supreme court decisions. The specific rule announced in the state su-

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<sup>65</sup> Even though the decision to certify lies within the discretion of the federal court, a lower court's decision not to certify may not be determinative. Federal appellate courts can certify questions on their own, and the appellate court's decision to certify may be separate from any sort of limited review of the lower court's refusal to certify on the basis of abuse of discretion. See generally *Lehman Bros. v. Schein*, 416 U.S. 386 (1974) (remanding for court to decide whether to certify).

<sup>66</sup> See generally M. REDISH, *supra* note 6, at 169-203 (stressing the importance of the *Erie* doctrine in solving state-federal system conflicts); Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693 (1974) (discussing the confusion caused by grouping different conceptual issues under the simple rubric of the *Erie* doctrine).



preme court decision will bind both the lower state courts and the federal courts applying state law in the future. Additionally, the reasons that are given for the decision will have the added gravitational force<sup>67</sup> associated with decisions of the highest court that has the authority to rule on an issue.

All of this is not to suggest that federal court *Erie* determinations are irrelevant to future cases or that they constitute aberrational departures from proper judicial activity. The fact that a federal court has resolved a question in a particular way, even if it does so in the guise of an *Erie* prediction, becomes part of the decisional milieu in which future cases will be resolved. While neither federal nor state courts ought to accept a federal *Erie* determination as binding in the future on a state law question,<sup>68</sup> the prior federal court decision on the issue ought at least to provide some guidance for structuring the relevant state legal standards and reasons in order to produce a coherent answer that is consistent with the rest of the law of the state.<sup>69</sup>

A consideration of the difference between making and ducking a decision governed by the law of another system reveals the positivist underpinnings of certification. Other-law decisionmaking differs from decisionmaking within the framework of the system to which the court belongs only in the effect that the decision will have in the future. As far as the parties to the lawsuit presenting other-law questions are concerned, the source of the decision is irrelevant. What matters to them is the content and how that content affects the overall chances of success. The source-based distinction between *Erie* determinations and answers to certified questions is significant, however, from the standpoint of how the decision will affect *judges* in *future* cases,<sup>70</sup> rather than the *litigants* in the *present* case.

The inconsistency of a natural law theory with a procedure for

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<sup>67</sup> See R. DWORKIN, RIGHTS, *supra* note 18, at 110-23.

<sup>68</sup> See *supra* note 45 and accompanying text.

<sup>69</sup> The idea in the text can be expressed in the language used by Professor Dworkin, as suggesting that the federal court decision is one of the factors that should be made to "fit" into a consistent set of decisions. R. DWORKIN, RIGHTS, *supra* note 18, at 116.

<sup>70</sup> The effects on future litigants and on parties who shape their conduct to successfully avoid having to become litigants are obviously matters that are significant. The corollary to the statement in the text is that those effects are dependent upon the different effects that federal and state court determinations of state law questions have on judges in future cases.

the intersystemic certification of questions emerges from a consideration of why a federal court would invoke the decisionmaking authority of the highest court of a different system. While there may be reasons to suppose that a state court would be a better decisionmaker than the federal court, the state court's ability to apply a moral test to the content of competing answers is unlikely to be superior to that of a federal court, and the federal court is even more unlikely to offer it as an explanation of a certification decision. Federalism recognizes political subdivisions within a nation, but the suggestion that those divisions reflect different concepts of morality seems startlingly inappropriate to the political ethos accepted in this country. Different notions of right or good are obviously part of American society, but the American Civil War seemingly laid to rest the idea that those notions would be officially implemented according to geographic location.

An attempt to reconcile intersystemic certification and natural law theory about the nature of law might distinguish between the kind of national morality that the preceding paragraph contemplates and other moralities that have more limited geographic scope. Some legal questions, it might then be argued, are more appropriately answered by a judicial body located within the area where this localized morality obtains. Even assuming for the moment that one could both identify the dividing line between national and localized moralities and determine what sorts of legal questions fall in the latter, this argument still does not undercut the legal positivist aspect of certification. A federal judge drawing the distinction between the morality that is part of the national culture and that which is more restricted in its scope and its appeal must have some basis for understanding both the reasons for the distinction and the reasons why the distinction matters. Arriving at such an understanding would be a necessary prerequisite of the decision to certify a question. But having arrived at that understanding, the "better *moral* decisionmaker" hypothesis is no more persuasive a rationale for why the court inside the system should decide the question than is the "better *legal* decisionmaker" hypothesis.

Differences in the *content* of standards, whether legal or moral, may call for differences in legal decisions. That much of a natural law theory may be reconciled with a federalism that requires a federal court to apply state law. But the existence and the use of a

procedural device that transfers a question of law across systemic boundaries must have its ultimate rationale in a theory of law that recognizes and upholds the significance of the *source* of legal decisions.

### III. CERTIFICATION AND THE NATURE OF ADJUDICATION

Although the preceding section suggests that the certification of questions from federal to state courts reflects a legal positivist theory of law, relying heavily on that suggestion as a motive for the adoption of certification or the use of it in a particular instance would be unwarranted. It simply does not seem plausible that the positivist underpinnings of certification come into play when a federal judge decides to certify a state law question. The point of the preceding section is that certification reflects a legal positivist theory of law, not that the use of certification is either limited to or especially attractive to those judges who consciously adopt such a theory. Nevertheless, some reflection on what the certification procedure actually says, even if only implicitly, about the nature of law may lead to different judgments about the desirability or the legitimacy of the practice.

If the theory of law reflected by the certification is merely a background feature of the device and does not impinge on the conscious choice to certify a question, then an examination of the factors that judges might actually use to support a decision to certify should provide an opportunity to test the jurisprudential notions that underlie the express reasons for certification. The contention explored in this section is that certification reflects a particular view of what judges do, and thus, just as it reflects a certain theory of law, certification also reflects a certain theory of adjudication.

The rationales for ducking the decision of an other-law question can be reduced to two principal themes. First, a court might decide to certify a question because of the risk that the decision it would otherwise reach might in some sense be "wrong." Second, the decision to certify a question might avoid some sort of "harm" to the parties in the federal litigation that raises other-law problems. The first two parts of this section explore those themes, and conclude that the notions of error and of harm cannot be applied in any meaningful or significant way to judicial decisionmaking in the other-law context. Having thus discarded the myth of error and the myth of harm as justifications for certification, the concluding

part of this section suggests that certification is a valid method of implementing a theory of adjudication because it accurately captures the nature of judicial responsibility in a federalist structure of government.

A. *The Myth of Error*

The most apparent sense in which a court might be said to err in the decision of an issue governed by the law of another system is for the court to produce a different answer than the one the institution which has the responsibility for the other law would have reached. Even when decision-ducking is justified on the ground that the court is avoiding a collision between state and federal power,<sup>71</sup> or avoiding a conflict between decisionmakers within the same system,<sup>72</sup> the notion of judicial error must be lurking in the background. Otherwise, if the federal court reached the "right" result, there would be nothing more than a formal collision or conflict.

The notion of the federal court erring on questions of state law receives its strongest support from evidence that after a federal court decided a question of state law, the courts of the state decided the issue differently. Former Chief Judge John R. Brown, one of the leading proponents of certification during his career on the United States Court of Appeals for the Fifth Circuit,<sup>73</sup> used the subsequent contrary state court decision to demonstrate the error of the earlier federal ruling. In one of his strongest statements

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<sup>71</sup> See, e.g., H. FRIENDLY, JURISDICTION, *supra* note 36, at 93 (advocating the avoidance of such a collision of powers).

<sup>72</sup> This rationale could be used for the kinds of decision-ducking that occur within a system. The doctrine of primary jurisdiction is an example of this intrasystemic decision-ducking. See *Sunflower Elec. Coop. v. Kansas Power & Light Co.*, 603 F.2d 791 (10th Cir. 1979) (avoidance of conflict between court and administrative agency offered as rationale for invoking doctrine of primary jurisdiction). Primary jurisdiction is a form of decision-ducking that introduces a new feature that is not found in the certification setting. While certification involves decisions that are, or could be, made by courts located within different systems, primary jurisdiction issues arise when there has been an allocation of decisionmaking responsibility between courts and administrative agencies. Primary jurisdiction might therefore be classified as an interinstitutional decision-ducking device, as distinguished from certification which involves decision-ducking that shifts the decisionmaking function to the same type of institution.

<sup>73</sup> See, e.g., *In re McClintock*, 558 F.2d 732, 733-34 (5th Cir. 1977) (noting the use of certification in various states and welcoming the chance to use it in Georgia for the first time); Brown, *Certification—Federalism in Action*, 7 CUM. L. REV. 455 (1977).

about the situation,<sup>74</sup> Judge Brown cited examples of what he referred to as federal courts being "overruled" by state court decisions on issues of state law previously decided by federal courts.<sup>75</sup> He offered illustrations of state courts "expressly refus[ing] to follow,"<sup>76</sup> "rejecting,"<sup>77</sup> or "rejecting outright"<sup>78</sup> earlier federal court decisions. More recently, Judge Brown has referred to federal courts being "reversed" by state courts.<sup>79</sup> Language of the sort used by Judge Brown misrepresents the relationship between federal and state courts and fails to provide support for the notion that subsequent state court decisions can be used to demonstrate federal court error on state law issues. The passage of time between the federal court decision of the state law issue and the later state court decision is one factor that undercuts the notion of error. Of the four cases cited by Judge Brown,<sup>80</sup> only one was decided at the appellate level of the state judicial system roughly contemporaneously with the federal court decision.<sup>81</sup> The other state appellate court decisions followed the federal court decisions by periods of fourteen months,<sup>82</sup> three years,<sup>83</sup> and seven years.<sup>84</sup> When the fed-

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<sup>74</sup> *W.S. Ranch Co. v. Kaiser Steel Corp.*, 388 F.2d 257, 262 (10th Cir. 1967) (Brown, J., concurring and dissenting), *rev'd*, 391 U.S. 593 (1968).

<sup>75</sup> *Id.* at 264-65.

<sup>76</sup> *Id.* at 264 n.11 (citing *Felmont Oil Corp. v. Pan American Petroleum Corp.*, 334 S.W.2d 449 (Tex. Civ. App. 1960)).

<sup>77</sup> *Id.* at 265 n.13 (citing *Yarrington v. Thornburg*, 58 Del. 152, 205 A.2d 1 (1964) and *Travelers Ins. Co. v. Auto-Owners (Mut.) Ins. Co.*, 1 Ohio App. 2d 65, 203 N.E.2d 846 (1964)).

<sup>78</sup> *Id.* n.14 (citing *Weed v. Bilbrey*, 201 So. 2d 771 (Fla. Dist. Ct. App. 1967), *cert. denied*, 364 U.S. 941 (1961)).

<sup>79</sup> *Barnes v. Atlantic & Pac. Life Ins. Co. of Am.*, 514 F.2d 704, 706 (5th Cir. 1975) (deciding that the question of whether a life insurance policy was in effect was an appropriate question for certification to Alabama Supreme Court since it dealt with a recurring contract interpretation).

<sup>80</sup> See *supra* notes 75-78 and accompanying text.

<sup>81</sup> See *Felmont Oil Corp. v. Pan American Petroleum Corp.*, 334 S.W.2d 449 (Tex. Civ. App.), *cert. denied*, 362 U.S. 952 (1960). In *Felmont Oil* the state appellate court expressly rejected the federal court of appeals decision in *Sinclair Oil & Gas Co. v. Masterson*, 271 F.2d 310 (5th Cir. 1959), decided five months earlier.

<sup>82</sup> See *Travelers Ins. Co. v. Auto-Owners (Mut.) Ins. Co.*, 1 Ohio App. 2d 65, 203 N.E.2d 846 (1964). Judge Brown cited this case as rejecting three Sixth Circuit decisions on the state law issue; however, only one of the three Sixth Circuit decisions was a case in which the question apparently would be answered by reference to Ohio law. See *American Fidelity & Casualty Co. v. Indemnity Ins. Co. of N. Am.*, 308 F.2d 697 (6th Cir. 1962), *cert. denied*, 372 U.S. 942 (1963).

<sup>83</sup> See *Yarrington v. Thornburg*, 58 Del. 152, 205 A.2d 1 (1964). Judge Brown cited this case as rejecting *Truitt v. Gaines*, 199 F. Supp. 143 (D. Del. 1961), *aff'd*, 318 F.2d 461 (3d

eral courts were called upon to decide the state law issues, there was no law of the particular state on those issues.<sup>85</sup> The longer the time span between the federal and state decisions, the more likely that the state consideration of the issue will occur in a different decisional milieu.<sup>86</sup> Furthermore, the subsequent state court decision may be affected not only by the prior federal decision itself, but also by any understanding derived from the operation of, and reaction to, the federal decision.<sup>87</sup> When the state court decides an issue a substantial length of time after the federal decision, a difference in answers is no more persuasive evidence of federal judicial error than would be reference to the 1980 presidential election returns as legitimate evidence of error in the 1976 elections. The totality of circumstances in which the respective decisions were made can be so different that the later decision ought not be used as evidence that the earlier decision was wrong.

Even in the narrower context in which the federal court is perceived as making an *Erie* prediction of what a state court would do with the issue that the federal court must decide,<sup>88</sup> the sequence of events that might occur within the state system helps to demonstrate the inaccuracy of basing the notion of error on a difference between a federal decision and a later state decision. Assume that the hypothetical wrongful death claim resulted in a federal court decision (SF) in favor of the legal sufficiency of the plaintiff's claim. At a later date, the Supreme Court of Anomie decides (NS) that a plaintiff with a similar claim has not stated a claim upon which relief can be granted. The notion of error in this situation would be predicated on the use of the state court decision NS as evidence that the federal court decision SF was incorrect. Use of

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Cir. 1963).

<sup>84</sup> See *Weed v. Bilbrey*, 201 So. 2d 771 (Fla. Dist. Ct. App. 1967), *quashed*, 215 So. 2d 479 (Fla. 1968), *cert. denied*, 394 U.S. 1018 (1969). Judge Brown cited this case as rejecting outright *Emerson v. Holloway Concrete Prods. Co.*, 282 F.2d 271 (5th Cir. 1960), *cert. denied*, 364 U.S. 941 (1961), in which Judge Brown dissented from the federal decision, which he said was "rejected by" the state court.

<sup>85</sup> The possible exception in Judge Brown's set of illustrative cases is *American Fidelity & Casualty Co. v. Indemnity Ins. Co. of N. Am.*, 308 F.2d 697 (6th Cir. 1962), *cert. denied*, 372 U.S. 942 (1963), in which the federal court refused to follow a state trial court decision on the state law issue. On the matter of an *Erie* obligation to conform to state trial court decisions, see generally 1A MOORE's, *supra* note 3, at ¶ 0.307[3].

<sup>86</sup> See *infra* notes 109-17 and accompanying text.

<sup>87</sup> See *supra* notes 68-69 and accompanying text.

<sup>88</sup> See *supra* note 43 and accompanying text.

the later state supreme court decision in this way leads to a number of unlikely propositions.

Suppose that before the state supreme court could issue its decision NS on the issue that the federal court had previously decided differently, a state trial court considered the issue.<sup>89</sup> The easiest case is probably (i) a state trial court decides NS, and the state supreme court affirms. This situation, in which there is state court uniformity on the issue, seems to come closest to supporting the notion that the federal court decision SF was incorrect. But suppose that, after the federal court decision SF, (ii) a state trial court decides NS, and the state supreme court does not review the decision, or (iii) a state trial court decides S, and the state supreme court reverses. The farther down the hierarchy of state courts one looks for *Erie* guidance,<sup>90</sup> the more plausible the proposition that, in situation (ii), the earlier federal court decision was incorrect. If, however, the federal court decision is determined to be incorrect in situation (ii), then situation (iii) appears to present a case in which the federal court was initially correct, but its decision was subsequently rendered incorrect by the state supreme court's review and reversal of the state trial court. A counterpart of that situation is the case in which (iv) a state trial court decides NS, and the state supreme court reverses. The state trial court's decision provides initial evidence that the federal court's decision was incorrect, but the subsequent state supreme court decision validates the decision of the federal court. The contrast between situation (ii) and the other sequences of state court decisions reveals that the characterization of the federal court decision as erroneous can turn on the fortuity of whether and how the state law issue is treated by the

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<sup>89</sup> For simplicity, I am assuming that the state has no intermediate appellate court and that the supreme court is reviewing a judgment that has been entered by the state trial court. One form of intrasystemic decision-ducking can occur in a state that has a procedure by which state trial courts can certify questions to state appellate courts prior to a trial court decision on the question. See, e.g., MICH. CT. R. 7.305(A). While this is a form of decision-ducking, it is not prompted by the other-law problem. Another intrasystemic certification procedure can provide for the bypass of a state intermediate appellate court. See, e.g., FLA. R. APP. P. 9.125 (authorizing state intermediate appellate court to certify to state supreme court "issues pending in the [intermediate appellate court that] are of great public importance or have a great effect on the proper administration of justice throughout the state"). This other kind of intrasystemic certification is also intended to accomplish a purpose other than dealing with the other-law problem.

<sup>90</sup> See *supra* note 85.

highest court of the state.

Even when the federal court is viewed as another state court for purposes of adjudicating state law claims because of the diversity of citizenship of the parties,<sup>91</sup> one obvious distinction between the federal-court-as-state-court and the ordinary state court is the federal court's location outside of the appellate review channels of the state system. A comparison between a federal court decision of state law and a subsequent lower state court decision, which stands unless and until reviewed by a higher court, ought not to serve as the basis for characterizing the federal court decision as correct or incorrect. Although the state supreme court's decision is an authoritative statement of the state law position on that issue, even that decision does not establish that an earlier federal court decision was right or wrong. Insofar as controlling state precedents were concerned, the federal court was writing on a clean slate. The state courts were writing on different slates at different times. That later writing may establish what the state law is at the later date, but the state court decisions cannot "relate back" to establish what the state law was at the time the federal court predicted what the state courts would have done had the issue been before the state courts *at that time*.<sup>92</sup> The discussion of the notion of error in the *Erie* setting so far has assumed that the federal court's task in deciding unsettled questions of state law is essentially that of predicting how the state courts will decide the question.<sup>93</sup> A different idea of federal court error might be linked to a static model of law that posits the existence of a state law answer to questions that have not yet been addressed by the state courts. In its crudest form, the static model depends on some mythical (if not mystical) omniscience about undeclared state law,<sup>94</sup> so that the determination of federal court error would be a process of comparing the

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<sup>91</sup> See *supra* note 29.

<sup>92</sup> See generally J. GRAY, *THE NATURE AND SOURCES OF THE LAW* 96-100 (2d ed. 1931) (discussing the idea of "questions not previously decided" in terms of a preexisting law versus the absence of law on the subject).

<sup>93</sup> See C. WRIGHT, *supra* note 6, at 375 (the function of the federal court in such a situation is to predict how the state court would decide the question, not to decide the question as the federal court would for its own purposes).

<sup>94</sup> See *Southern Pac. Co. v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting) (rejecting idea that law was some "brooding omnipresence in the sky"). See generally H. POHLMAN, *JUSTICE OLIVER WENDELL HOLMES & UTILITARIAN JURISPRUDENCE* 76-143 (1984) (analysis of Holmes' theories of law and judicial decisionmaking).



federal decision and the "real" answer that preexisted any state court declaration on the issue. Such implausible ideas of adjudication as a process of discovery rather than creation are bound up with the discredited legal formalism of an earlier jurisprudential age,<sup>95</sup> and may reflect, more than anything else, a perceived need to present to the public an image of judicial authority confined within relatively narrow boundaries. A different sense in which there can be a right or wrong answer to a question that has not yet been decided by a state court—a notion that suggests the replacement of the potentially misleading right/wrong language with a better/worse distinction—will be explored following a consideration of the idea that certification is justified as a method of avoiding the harm that might be caused by differences between federal and state court decisions on state law questions.

### *B. The Myth of Harm*

Establishing that a difference exists between a federal court decision on a state law issue and a subsequent state court decision on the same issue does not demonstrate that the federal court decision was incorrect. Nevertheless, destroying the myth of error may not, in itself, be sufficient to undercut the use of the difference between a federal and subsequent state court decision (or the potential for such a difference to occur) as a rationale for the use of certification as a decision-ducking device. If substantial adverse consequences resulting from the difference in decisions are identified, those consequences may call for the use of the certification technique to avoid the difference. The certification procedure might be justified as a way of preventing harm even if the difference in decisions does not demonstrate error. Among the potential candidates for the victims of the harm caused by this actual or potential disparity between federal and state court decisions are the federal court deciding the state law issue, the judicial process as a whole, and the parties to the federal litigation that produced the state law decision that differed from the subsequent state court

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<sup>95</sup> See R. SUMMERS, INSTRUMENTALISM AND AMERICAN LEGAL THEORY 136-59 (1982) (discussing the attack on formalism and contrasting instrumentalism and formalism). *But see* Good & Tullock, *Judicial Errors and a Proposal for Reform*, 13 J. LEGAL STUD. 289 (1984) (using probability theory to develop a standard to determine whether judicial decisions are right or wrong).

decision. The concern for avoiding that disparity, even to the extent of ducking the state law issue, depends on identifying the adverse effects and determining whether those effects justify taking special efforts in the other-law setting.

A concern that should not be given much weight is the embarrassment suffered by federal judges whose decisions on state law issues are contradicted by subsequent state court decisions. Judge Brown has spoken frankly about his sense that it is "awkward—and, to some, not a little embarrassing—when our first guess [on a state law issue] turns out to be wrong and the state court makes the second and last guess by reversing our holding."<sup>96</sup> An unsympathetic observer might simply disparage the ego demands of such sensitive federal judges,<sup>97</sup> or even suggest that the experience might occasionally be healthy for some occupants of the federal bench. If avoiding this type of loss of face is in fact a phenomenon of federal judicial behavior, then a certification procedure at least has the virtue of being a more efficient decision-ducking device than the alternatives.

Only slightly less trivial than the concern for the ego of the federal judge who is subsequently "overruled" or "reversed" by a state court is the detrimental effect this sequence of events might have on the institutional prestige or legitimacy of the federal courts. This notion of harm seems to rest on the idea that disparate federal and state court decisions reveal judicial decisionmaking as an arbitrary exercise in which judges "do what they want," rather than "apply the law." In one sense, this idea contemplates an unrealistic level of public awareness of judicial decisions for the purpose of identifying the instances in which state courts come to different conclusions than those reached by federal courts on state law issues. The number of people untrained in the law who are sufficiently interested in or knowledgeable about judicial decision-making for them to follow a sequence of decisions in different court systems is likely to be fairly small. While admittedly not a

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<sup>96</sup> Brown, *Certification—Federalism in Action*, 7 CUM. L. REV. 455, 455 (1977).

<sup>97</sup> The situation described by Judge Brown may enable the federal judge who "guesses correctly" about state law to engage in a little "one-upjudgeship." When the issue of state law was subsequently decided differently by a state court, the federal judge who dissented on that issue can say, in properly judicious language, of course, "I told you so." See *supra* notes 74 & 84 (Judge Brown dissenting from federal court of appeals decisions which were subsequently decided differently by the relevant state courts).

very intellectually satisfying reason for a lack of concern about the public perception problem, the infrequency of the perception of significant disparity should serve to reduce both the probability that harm of this sort would occur and the amount of resources that would be worth devoting to a response to the problem.

On a different level of analysis, one might conclude that perception of a disparity in judicial decisions may just as likely result in a benefit as in a harm. The simplistic view that law is "out there" waiting to be found is fairly difficult to maintain when respected courts reach opposite results on identical issues. Even a process of trying to decide which of the decisions is "correct" should prompt at least the beginnings of a more sophisticated inquiry into the process of judicial decisionmaking and may lay the foundation for a rejection of the opposite extreme that judges reach whatever decisions their personal preferences dictate.

The public-perception idea of harm is not uniquely tied to the federalism feature of the other-law problem. State courts in adjacent states can resolve the same issue of state law differently just as easily as can a state and federal court. The final notion of harm, however, initially does appear more directly attributable to the federalism structure of government that produces different legal systems that might adjudicate legal issues. With this last notion of harm, the focus is on the parties to the earlier federal litigation, raising the concern that they are somehow mistreated by a decisionmaking structure that allows a state court at a later date to decide the state law issue differently.

At the outset an argument might be made against giving any weight to the harm to the parties because the adverse effects, whatever they might be, are part of the price that is paid by those litigants who choose to have their state law claims adjudicated in a federal court. The argument fails for two reasons. First, state law issues can arise in cases that are within the exclusive jurisdiction of the federal courts, thus leaving the parties without any direct means of obtaining a state court resolution of the state law issues.<sup>98</sup>

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<sup>98</sup> See, e.g., *Imel v. United States*, 375 F. Supp. 1102 (D. Colo. 1974), *certified question answered*, 184 Colo. 1, 517 P.2d 1331 (1974), *aff'd*, 523 F.2d 853 (10th Cir. 1975) (question of state law arose in action under 28 U.S.C. § 1346(a)(1) (1982), which grants original jurisdiction to federal district courts, concurrent with the Court of Claims, for actions "against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without au-

Second, even when the case is in federal court on the basis of diversity of citizenship,<sup>99</sup> or any other grant of jurisdiction that is concurrent between federal and state courts,<sup>100</sup> at least one of the parties is likely to have had no realistic control over the forum in which the case will be tried. For example, neither the defendant in a case filed in federal court nor the plaintiff whose action, filed in the state court was properly removed to the federal court,<sup>101</sup> will have selected the federal forum.

Having dismissed the argument that the federal litigants have voluntarily submitted themselves to whatever adverse effects may flow from the federal court's resolution of the state law issue, it remains to identify and evaluate those effects. Consider the hypothetical wrongful death claim against a background in which there is no controlling precedent in the decisions of the Anomie state courts. If the federal court were to decide that the state courts would refuse to recognize the legal sufficiency of the claim that the plaintiff is asserting, the court would grant the defendants' motion to dismiss for failure to state a claim upon which relief can be granted.<sup>102</sup> Should the state courts subsequently recognize a claim for relief on the grounds asserted by this plaintiff,<sup>103</sup> she conceiva-

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thority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws"); *D'Ambra v. United States*, 354 F. Supp. 810 (D.R.I.), *aff'd*, 481 F.2d 14 (1st Cir.), *cert. denied*, 414 U.S. 1075 (1973), *certified question answered*, 114 R.I. 643, 338 A.2d 524, *aff'd*, 518 F.2d 275 (1st Cir. 1975) (claim brought under Federal Tort Claims Act, 28 U.S.C. § 1346(b) (1982) turned on issue of state tort law.

<sup>99</sup> Two publications present appendices purporting to list all the certified question cases available on the date of publication. See Lillich & Mundy, *supra* note 5, at 910-12; Note, *Civil Procedure*, *supra* note 5, at 1176-81. Lillich and Mundy do not identify the basis of jurisdiction in the seventeen cases they list. Examination of those cases reveals that jurisdiction is, or appears to be, based on diversity of citizenship in eleven of the seventeen. The appendix in the Note lists forty-three cases and identifies twenty-seven as being based on diversity jurisdiction. Two Maryland cases are identified as "not explicit" as to their jurisdiction bases. Note, *supra*, at 1177. These two would also appear to be based on diversity jurisdiction, raising the total to twenty-nine of forty-three. See *Smith v. Gray Concrete Pipe Co.*, 267 Md. 149, 297 A.2d 721 (1972); *Volkswagen of Am., Inc. v. Young*, 272 Md. 201, 321 A.2d 737 (1974). My own compilation of certified question cases reveals that roughly seventy-five percent are, or appear to be, based on diversity jurisdiction.

<sup>100</sup> See, e.g., The Outer Continental Shelf Lands Act, 43 U.S.C. § 1333(a) (1982).

<sup>101</sup> See 28 U.S.C. § 1441 (1982).

<sup>102</sup> FED. R. Civ. P. 12(b)(6).

<sup>103</sup> If the state court recognition of the claim occurs while the plaintiff's federal claim is in the appellate stage, the federal appellate courts will conform their application of state law to the state court decision that was rendered after the federal trial court had disposed of the matter. See C. WRIGHT, *supra* note 6, at 372.

bly could be the only litigant denied adjudication of this claim.<sup>104</sup> The conclusion that might be drawn from this scenario is that the plaintiff has been harmed by being deprived of a determination of her claim because of the way the federal court resolved the state law issue.<sup>105</sup>

The flaw in this conclusion is revealed through a comparison of the position of this plaintiff with the potential treatment of litigants within the courts of the system whose law governs the issue. In a number of situations, litigants within the state court system are potentially subject to the same consequences as the parties to a federal case when the federal court's decision on a state law issue is later contradicted by a state court decision. A court faced with an issue at one time might hesitate to take a step that could be ultimately taken in the relatively near future.<sup>106</sup> The parties in the

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<sup>104</sup> Judge Brown has said of the refusal to use the decision-ducking device of abstention: Denying one of these parties the chance to get a determination now by the only Court which can authoritatively speak brings about one of those curious aberrations of the law in which the only party ultimately hurt is the one who happens to lose the particular case since all others will soon be protected. For the Supreme Court of New Mexico is sure to speak and I would predict that it will speak soon, although I do not know which way it will speak.

W.S. Ranch Co. v. Kaiser Steel Corp., 388 F.2d 257, 266 (10th Cir. 1967) (Brown, J., concurring and dissenting) (footnote omitted), *rev'd*, 391 U.S. 593 (1968). The state court subsequently did speak in favor of the loser in the federal appellate court. Kaiser Steel Corp. v. W.S. Ranch Co., 81 N.M. 414, 467 P.2d 986 (1970).

<sup>105</sup> The sequence of decisions depicted in this hypothetical case could be reversed and still make essentially the same point. *See, e.g.,* Life Ins. Co. v. Shifflet, 359 F.2d 501 (5th Cir. 1966). The Fifth Circuit began by affirming a decision in favor of the plaintiff, who was an insurance policy claimant. *Id.* at 501. Then, after an intermediate state appellate court decision was filed five and one-half months later, casting doubt on that result, Douglas v. Mutual Life Ins. Co., 191 So. 2d 483 (Fla. Dist. Ct. App. 1966), the court decided, on rehearing, to certify the crucial issue to the Supreme Court of Florida, 370 F.2d 555 (5th Cir. 1967). The state supreme court answered the certified question, 201 So. 2d 715 (Fla. 1967), in a way that led the federal appellate court to reverse its earlier decision and remand with directions to enter judgment for the defendant, 380 F.2d 375 (5th Cir. 1967).

<sup>106</sup> The point is illustrated by the series of Alabama supreme court cases wrestling with the question of an insurer's liability for a bad faith refusal to pay a claim that was filed by the insured. *See* Chavers v. National Sec. Fire & Casualty Co., 405 So. 2d 1 (Ala. 1981) (recognizing the bad faith cause of action and discussing the recent history of the claim within that state). Alabama tort law provides a number of examples of fairly rapid doctrinal development. *See, e.g., supra* note 55. The speed with which the law developed in that state is due, in part, to the state's relatively recent emergence from a murky world of mindless formalism, for which a large part of the responsibility may be attributable to the lack of a national perspective of a generation of the state's most influential law professors. *See* Randleman, *More on Procedural Reform*, 33 ALA. LAW. 37 (1972) (castigating the state's adherence to the common law forms of action and demonstrating that "the development of Ala-

state court litigation that occurred prior to the change are in substantially the same position as the parties in a federal court action in which the federal court fails to anticipate and apply the change in the disposition of the state law issue.<sup>107</sup> In a similar vein, a court might decide an issue in a particular way, only to have the legislature express its disagreement with the decision by enacting a statute applicable to future cases raising the same issue.<sup>108</sup> In a routine state court case, the parties may find that they are litigating a matter that is simply not appealable as a practical matter, given the relationship among the costs of an appeal, the amount in controversy, and the financial status and interest of the losing party in the trial court. In the sense in which any of these state court litigants are harmed by the results reached in their cases, such harm is a result of the time-specific nature of the adjudication process. The allegation of harm, whatever sympathy it may evoke, is no more valid as a basis for extraordinary adjudicatory techniques than would be true in any other situation in which an ability to

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bama tort law has been stunted by the procedural requirements of the forms of action").

<sup>107</sup> The losing federal litigant would probably not be able to use Fed. R. Civ. P. 60(b) to obtain relief from the judgment based on the fact that the state court system had subsequently produced a different decision on the issue of state law. See 7 J. MOORE & J. LUCAS, MOORE'S FEDERAL PRACTICE ¶ 60.26[3] (2d ed. 1985).

It should be noted that while 60(b)(5) authorizes relief from a judgment on the ground that a prior judgment upon which it is based has been reversed or otherwise vacated, it does not authorize relief from a judgment on the ground that the law applied by the court in making its adjudication has been subsequently overruled or declared erroneous in another and unrelated proceeding.

*Id.*

For the treatment of the situation in which the change in state law occurs while the federal case is on appeal, see *supra* note 103.

<sup>108</sup> See, e.g., *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111 (1944) (decision regarding whether independent contractors should be included within the term "employee"); 29 U.S.C. § 152 (1982). See generally R. GORMAN, BASIC TEXT ON LABOR LAW: UNIONIZATION AND COLLECTIVE BARGAINING 28-31 (1976) (discussing *Hearst Publications* and the effect of congressional acts upon NLRB cases). An intersystemic example of the same kind of legislative response to a judicial decision is the experience with Virginia's legislation requiring seat belts to be installed in automobiles. The legislation initially provided that the failure to use seat belts should not be deemed to constitute negligence for purposes of applying Virginia's contributory negligence defense. Acknowledging that statute, a federal district court nevertheless held that failure to wear a seat belt could be considered in relation to the question of whether a plaintiff's recovery should be reduced because of his failure to mitigate damages. *Wilson v. Volkswagen of Am., Inc.*, 445 F. Supp. 1368 (E.D. Va. 1978). The state legislature soon thereafter amended the statute to provide explicitly that "nonuse of such devices [shall not] be considered in mitigation of damages of whatever nature." VA. CODE § 46.1-309.1 (Supp. 1985).

postpone the consideration of an issue may increase the chance that a different decision would be reached. The "harm" suffered by federal litigants who subsequently see state court litigants treated differently is thus not a matter that is attributable to the other-law problem in the federalism setting.

*C. The State Court and the Search for a "Better" Decision*

If federal court decisions on unsettled state law questions are not in any meaningful sense wrong, and if the parties to the federal lawsuit are not in any significant way harmed by the federal court's decision of an unsettled question of state law, then the question remains whether a theory of adjudication can support a certification procedure. The thesis presented in this final section of the article is that a state court may be able to reach a "better" decision, even if it is unrealistic to refer to the state court decision as the "correct" decision.

What sort of theory of adjudication will account for a procedure in which one court asks another court to answer a question of law? The theoretical justification for certification must accommodate a number of features of this decision-ducking device. A justification that sweeps too broadly runs the risk of suggesting that every time a choice-of-law rule requires the application of the law of some other system, the question should be referred to that system. Part of the responsibility of a theory of adjudication that supports certification must therefore be to provide some criteria for identifying the questions of another system's law that are appropriate for referral to a court located in that system. A justification for certification ought, as well, to acknowledge the peculiarly unjudicial appearance of the task accepted by the state court in answering questions, rather than adjudicating cases or resolving disputes.<sup>109</sup> The ability of a trial court to involve the highest court of another system in the answering of questions at a stage of the proceedings when review by the appellate courts of its own system would likely be unavailable is another feature that deserves some explanation.

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<sup>109</sup> The concern over the nonjusticiability of requests for advisory opinions may lead to some resistance to adoption of a certification procedure. See *United Servs. Life Ins. Co. v. Delaney*, 396 S.W.2d 855 (Tex. 1965) (because federal court invoking abstention doctrine still reserved jurisdiction to give final judgment, state court was merely being advisory, and the state court had no power to give advisory opinion); Brown, *supra* note 96, at 458-59.

A strong temptation exists at this stage of the enterprise to respond to the question posed at the beginning of the preceding paragraph with the single word "Dworkin." The theory of adjudication that best supports the certification technique is a theory woven together from some of the component strands of adjudication theory that Ronald Dworkin has been building over the last two decades.<sup>110</sup> The portions of Dworkin's thinking that are useful in an endeavor to understand and explain certification can be organized in a way that reconciles these portions with the legal positivist feature of certification, which was described in Part II. Because Dworkin's writing is so insightful, and because his scope of inquiry is both so broad and so fundamental, careful identification of the points of agreement and disagreement is essential. With a body of work that is as dynamic as Dworkin's, an added burden weighs on those who make use of his insights to acknowledge the ways in which his views have been modified or become more clearly expressed through his continued attention to the issues and his responses to critics.<sup>111</sup>

The first task in constructing a theory of adjudication that supports certification is to jettison the idea that a preexisting right answer exists to the unsettled question of state law. Some of Dworkin's work could be interpreted as supporting the notion of a preexisting right answer,<sup>112</sup> but his later explanations convey a different impression.<sup>113</sup> What I believe Dworkin is saying is that, among the competing answers to a question previously undecided within the system whose law governs, one answer will be better than the others.<sup>114</sup> The judicial task thus is to identify this better answer. The question that then arises is why a state court would have an

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<sup>110</sup> See *supra* note 18.

<sup>111</sup> Several commentators, including H.L.A. Hart, criticized Professor Dworkin in *Jurisprudence Symposium*, 11 GA. L. REV. 969 (1977). Professor Dworkin responded to these critics in the same issue. See Dworkin, *Seven Critics*, 11 GA. L. REV. 1201 (1977).

<sup>112</sup> See, e.g., R. DWORKIN, *PRINCIPLE*, *supra* note 18, at 119-45; Dworkin, *No Right Answer?*, in *LAW, MORALITY AND SOCIETY: ESSAYS IN HONOUR OF H.L.A. HART* 58-84 (1977).

<sup>113</sup> See Dworkin, *Reply*, *supra* note 18, at 275-78.

<sup>114</sup> See R. DWORKIN, *PRINCIPLE*, *supra* note 18, at 17 ("Each judge deciding that issue of principle decides as he does, not because all alternatives are excluded by what is already in the rule book, but because he believes his principle to be correct, or at least *closer to correct* than other principles that are also not excluded.") (emphasis added); Dworkin, *Reply*, *supra* note 18, at 278 ("in hard cases at law one answer might be *most reasonable* of all, even though competent lawyers will disagree about which answer is the most reasonable") (emphasis added).



ability superior to that of a federal court to identify the better answer to a question of state law.

The state court's superior ability to identify the better answer is attributable to the state court's location within, and the federal court's location outside of, the particular decisional milieu of the state system. A decisional milieu is the total environment within which law is crafted—a complex set of specific factors that affect the content of legal rules. Judicial decisionmaking, in the context of the other-law problem, is necessarily an exercise in the posing and answering of hypotheticals. The court located in another system must ask what it would decide if it were within a different decisional milieu. The hypotheticals will vary according to how difficult it will be to imagine the effect of the system-specific factors on the question and also according to how significant the effects of the system-specific factors might be on the resolution of the question. The essence of the adjudication theory's support for certification is the insider/outsider distinction and the belief that the insider decisionmaker, affected by the decisional milieu in a way that the outsider decisionmaker cannot be, should have the opportunity to reflect that decisional milieu in the content of some legal rules.

This belief not only explains why a certification technique is consistent with a federalism structure of government and an allocation of decisionmaking authority to judicial bodies located in different systems; it indicates as well the lines along which we can pursue the answer to the problem of what kinds of questions are appropriately certified to the highest court of the state whose law governs the questions. When the system-specific factors are most relevant and the effects of those factors are least likely appreciated by a court located outside the state system, the rationale for certification is at its peak.

This decisional milieu rationale for certification is closely related to the federalism characteristic of the American system of government. Some values, resources, experiences, and attitudes are, at least in theory, common to the nation as a whole. Federal law might be seen, then, as an embodiment of what is shared within the nation as a whole. By contrast, state law can be viewed as a reflection of what is distinctive, peculiar, or idiosyncratic to a particular political subdivision. When important questions will likely be significantly affected by sub-national factors, certification offers a method of obtaining answers from the court most sensitive to

those factors.

The remaining feature of certification that needs to be worked into a supporting theory of adjudication is the involvement of the highest state court in the apparently abstract answering of prematurely posed questions. Unlike such decision-ducking devices as abstention, where the state courts are resolving cases actually filed within the state system, certification presents the state court with a question rather than a case. The willingness of the states to authorize a question-answering function for their highest courts might be tied into a theory of adjudication that recognizes a distinction among rules, reasons, and dispositions as types of judicial speech. *Dispositions* may be defined statements about who won and lost—they are thus most analogous to performative utterances.<sup>115</sup> In the context of certification, an example of a disposition would be the state supreme court's statement that the certified question is answered in the negative. The more typical disposition statement is "judgment for the defendant," or "judgment reversed." *Rules* are statements of the legal standards that govern the disposition of the present case and future cases presenting the same issue. A rule statement in the hypothetical wrongful death case might be, "no liability for prenatal injuries inflicted prior to viability, when the child is not born alive." *Reasons* are statements of why a particular rule exists in its adopted form. The designation of this kind of judicial statement as a reason avoids the need to distinguish between principles and policies as actual or legitimate support for judicial decisions.<sup>116</sup> The certification procedure produces a complete set of judicial statements: the answer to the certified question is the disposition; the highest state court answers the question by issuing a rule,<sup>117</sup> and supports its answer with reasons.

What certification seems to reveal, therefore, is the centrality of rules and reasons to adjudication that involves the type of decisionmaking—lawmaking rather than merely law-applying—which is adjudication uniquely within the province of the highest courts of legal systems. When a significant rule of state law must be created to resolve a federal case and when the federal court will likely

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<sup>115</sup> See J.L. AUSTIN, *supra* note 19.

<sup>116</sup> See *supra* note 32.

<sup>117</sup> See *supra* notes 42-46 and accompanying text.

not be affected by the same decisionmaking factors in the same way as a state court, the lawmaking function of the highest state court is properly invoked by the process of intersystemic certification.

#### IV. CONCLUSION

This examination of certification has attempted to show the jurisprudential ideas that implicitly underlie the process of asking a court of another system to answer a question of that system's law. Such an adjudicatory technique reveals that the source of a legal rule is a matter of critical importance in the identification of that rule as a rule of a particular system and that the content of a particular rule may be more appropriately determined by a judicial decisionmaker located within the system.

Although the primary focus of the article has been on what jurisprudence can tell us about certification, I believe that this examination of certification also tells us something about jurisprudence. The most striking implication may very well be the ease with which a legal positivist view of the nature of law can accommodate to at least a crude version of a "better answer" thesis of adjudication derived from the work of Professor Dworkin. Obviously, this article has not presented anything close to a full explication of the differences between Dworkin and legal positivists. Nor do I mean to suggest that those differences are insignificant or uninformative.<sup>118</sup> What this look at certification may reveal is the significance of the similarities between positivism and some of the views associated with Dworkin. In any event, this article suggests that careful examination of particular judicial processes, especially in a society that gives as prominent a role to adjudication as ours does, can offer a means of testing and refining the more abstract jurisprudential theories about law and adjudication.

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<sup>118</sup> See P. SOPER, *supra* note 16, at 105 (characterizing Dworkin as a "neo-nonpositivist").